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## Note

### Protecting Communities from Unwarranted Environmental Risks: A NEPA Solution for ICCTA Preemption

Shata L. Stucky\*

In 1995, Congress passed the Interstate Commerce Commission Termination Act (ICCTA)<sup>1</sup> in an effort to relieve the railroad industry of burdensome regulation.<sup>2</sup> The ICCTA preempts local land use regulations that communities formerly employed to protect valuable resources such as drinking water supplies.<sup>3</sup> Under some circumstances, the National Environmental Policy Act (NEPA)<sup>4</sup> provides the public with a degree of assurance that railroad projects will not unduly threaten the environment.<sup>5</sup> However, because NEPA does not apply to *all* railroad projects, the ICCTA's preemption provision continues to create a regulatory loophole through which railroad companies may undertake a variety of environmentally harmful activities without any local or federal government oversight.<sup>6</sup>

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1. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C. (2000)).

2. See H.R. REP. NO. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 794.

3. See 49 U.S.C. § 10501(b) (2000) (“[T]he remedies provided [by the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under . . . State law.”).

4. 42 U.S.C. §§ 4321–4347 (2000).

5. See *id.* § 4332(2)(C) (mandating the preparation of environmental impact statements in certain instances).

6. See *Train Refueling in Never-Never Land: A License to Spill?*, LOC.

Theoretically, courts could close the loophole by interpreting the ICCTA narrowly.<sup>7</sup> Yet no courts to date have taken this approach, and two courts of appeals have expressly rejected such an interpretation.<sup>8</sup> Consequently, this Note recommends that Congress close the loophole through statute.

Part I of this Note provides an overview of the ICCTA's preemption provision and examines the overlap between local and federal laws in the field of land use regulation. Part II demonstrates the consequences of the ICCTA's preemption provision through a case study, showing that—even where railroad companies voluntarily seek local government approval to undertake risky activities—the ICCTA skews the power structure and makes it difficult for governments to impose necessary restrictions. Finally, Part III concludes that the Surface Transportation Board (STB)<sup>9</sup> and the courts are unlikely to interpret the ICCTA in a way that would eliminate the regulatory loophole, and that Congress should close this loophole by enacting a modified version of NEPA.

## I. THE CURRENT REGULATORY SCHEME

In reviewing the regulatory landscape affecting railroad projects and land use decisions, this Note will describe (A) the origins of the Interstate Commerce Commission Termination Act and the Surface Transportation Board, (B) the breadth of the ICCTA's preemption provision and the resulting regulatory loophole, and (C) the current state of land use regulation as divided between local and federal governments.

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PLANET WKLY. (Spokane, Wash.), Feb. 21, 2001, at 7 (noting that, in certain instances, railroad companies are “essentially unregulated”).

7. See Maureen E. Eldredge, Note, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 586–89 (2004) (emphasizing that Congress intended to preempt local “economic” regulation of railroads and arguing that courts could close the loophole by adopting a narrow interpretation of the ICCTA).

8. See *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 644–45 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 547 (2005) (refusing to distinguish environmental regulations from economic regulations); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (rejecting the same distinction).

9. The STB is the administrative agency charged with adjudicating and resolving issues arising under the ICCTA. Overview of the STB, <http://www.stb.dot.gov/stb/about/overview.html> (last visited Dec. 5, 2006).

#### A. RAILROAD REGULATION AND THE SURFACE TRANSPORTATION BOARD

Congress created the Interstate Commerce Commission in 1887 to prevent railroad companies—possessing certain characteristics of natural monopolies—from exploiting the enormous power they wielded over the shippers and communities they served.<sup>10</sup> By the 1970s, however, the railroad industry fell from its dominant position and was on the verge of collapse due to the emergence of the trucking, pipeline, and barge industries.<sup>11</sup> To save the industry, Congress began implementing a series of deregulation measures.<sup>12</sup> One of these deregulation measures was the ICCTA.<sup>13</sup> Noting “that the surface transportation industry is competitive and that few economic regulatory activities are required to maintain a balanced transportation network,”<sup>14</sup> Congress passed the ICCTA in 1995 with the goals of “eliminat[ing] obsolete rail provisions”<sup>15</sup> and “keep[ing] bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate.”<sup>16</sup>

The ICCTA effectively replaces the Interstate Commerce Commission with the Surface Transportation Board (STB), a smaller three-member independent adjudicatory panel<sup>17</sup> within the Department of Transportation.<sup>18</sup> The STB “has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments)”<sup>19</sup> and has a number of corresponding regula-

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10. See H.R. REP. NO. 104-311, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 802.

11. See *id.*

12. See *id.* at 90–91, *reprinted in* 1995 U.S.C.C.A.N. at 802–03 (listing several federal projects undertaken to improve the economic situation of the railroad industry, such as the creation of Amtrak in 1971 and the enactment of the Staggers Rail Act of 1980).

13. See *id.* at 93, *reprinted in* 1995 U.S.C.C.A.N. at 805 (“[The ICCTA] builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector.”).

14. *Id.* at 82, *reprinted in* 1995 U.S.C.C.A.N. at 794.

15. *Id.*

16. *Id.*

17. *Id.* at 90, *reprinted in* 1995 U.S.C.C.A.N. at 802.

18. See 49 U.S.C. § 701(a) (2000). The President may appoint STB board members with the advice and consent of the Senate. *Id.* § 701(b)(1). The President may not appoint more than two members from the same political party. *Id.*

19. Overview of the STB, *supra* note 9; see 49 U.S.C. § 10501(b) (2000).

tory and adjudicatory responsibilities.<sup>20</sup> Despite language in the ICCTA indicating that the STB's jurisdiction is "exclusive,"<sup>21</sup> courts have recognized that the STB's authority to adjudicate disputes and enforce liability against rail carriers does not deprive federal courts of jurisdiction over these same types of matters.<sup>22</sup> Consequently, parties alleging violations of the ICCTA may file complaints with either the STB or with federal courts. And parties wishing to file civil suits based on state law may bring actions in state courts, provided the state regulation falls outside the scope of ICCTA's preemption provision.<sup>23</sup> When interpreting the ICCTA, courts defer to the STB, provided the Board's interpretation is reasonable.<sup>24</sup>

#### B. ICCTA PREEMPTION AND THE RESULTING REGULATORY LOOPHOLE

Discussing changes to the railroad regulatory scheme, the House report on the ICCTA indicates that one of Congress's intentions in enacting the statute was to preempt entirely state economic regulation of railroads.<sup>25</sup> Congress achieved this goal through the ICCTA's general jurisdiction provision, section 10501(b):

The jurisdiction of the Board over—

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car

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20. For example, the STB must decide whether to allow railroads to construct extensions to railroad lines, construct additional railroad lines, or provide transportation over extended or additional lines. 49 U.S.C. § 10901(a)(1)–(3) (2000). The STB also has the authority to (1) set rates, hear complaints regarding overcharging, and issue orders to stop related violations, 49 U.S.C. § 10704(a)(1) (2000); (2) exempt railroads from antitrust laws, 49 U.S.C. § 10706(a)(2)(A) (2000); and (3) prohibit the abandonment of railroad lines or the discontinuance of transportation services on grounds that it will have a serious, adverse impact on rural and community development, *id.* § 10901(a), (c).

21. 49 U.S.C. § 10501(b) (2000).

22. See *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 204–05 (1st Cir. 2000) (holding that the ICCTA does not deprive federal courts of jurisdiction).

23. See *id.*; Eldredge, *supra* note 7, at 559–60 (“STB administrative remedies augment but do not eliminate the role of federal and state courts.”).

24. See *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 548 (6th Cir. 2002) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–45 (1984)); Eldredge, *supra* note 7, at 560 (“Even if an STB determination is not binding, it nonetheless strongly influences courts.”).

25. H.R. REP. NO. 104-311, at 95–96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807–08.

service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive.<sup>26</sup>

Furthermore, the general jurisdiction provision declares that “the remedies provided [by the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”<sup>27</sup>

Following Supreme Court doctrine,<sup>28</sup> courts assume that federal statutes do not supersede historic police powers of the states unless Congress clearly manifests such a purpose.<sup>29</sup> Because land use regulation is an aspect of states’ police power,<sup>30</sup> courts and the STB have struggled to determine exactly which state and local land use laws are preempted by the ICCTA’s express preemption of state “regulation of rail transportation.”<sup>31</sup> To guide their decision making, the courts and the STB have developed several ways of articulating the scope of ICCTA preemption.

The STB and several courts have articulated an “integral to interstate operations” test, whereby the ICCTA preempts any local requirements that otherwise would be applied to facilities that are an integral part of the railroad’s interstate operations.<sup>32</sup> Under this test, local governments cannot apply

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26. 49 U.S.C. § 10501(b).

27. *Id.*

28. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

29. *See, e.g., Vill. of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 61 (N.J. 2000).

30. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926) (upholding zoning as a valid exercise of police powers delegated by states to their municipalities); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* § 3.5 (1998).

31. Although the specific language of section 10501(b) preempts “state law,” the STB and most courts do not distinguish between state and municipal law. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025, 1028, 1030–31 (9th Cir. 1998). Even the Eleventh Circuit, which has made such a distinction, notes that the ICCTA preempts municipal laws that have the effect of burdensome state laws. *See Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1330–31 (11th Cir. 2001).

32. *See, e.g., Green Mountain R.R. v. Vermont*, Civil No. 1:01CV00181, 2003 WL 24051562, at \*4 (D. Vt. Dec. 15, 2003), *aff’d*, 404 F.3d 638, 644–45 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 547 (2005) (“Congress granted the STB

“state and local permitting or pre-clearance requirements (including environmental requirements)” to integral facilities “because, by their nature, [the requirements] interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations.”<sup>33</sup> This test requires the Board to make fine distinctions. For example, the STB determined that while an auto storage facility is integral to railroad operations,<sup>34</sup> a corn processing plant is not integral because it is not integrally related to transportation services.<sup>35</sup>

Despite ruling out *all* local zoning and pre-clearance requirements that apply to integral railroad facilities, the STB emphasizes that localities retain certain police powers to protect public health and safety.<sup>36</sup> The Board gives several examples of qualifying public health and safety regulations: local governments “can enforce, in a non-discriminatory manner, electrical and building codes”<sup>37</sup> and “can take actions that are necessary and appropriate to address any genuine emergency on railroad property.”<sup>38</sup> The STB also suggests that a local government could prohibit a railroad from dumping excavated earth into local waterways and could issue citations or seek damages if a railroad discharged harmful substances during a construction or upgrading project.<sup>39</sup> Additionally, courts can enforce agreements into which railroad companies have entered voluntarily, even in instances where the ICCTA would have shielded the company from its commitments under the con-

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broadened preemptive jurisdiction over facilities that are an integral part of railroad transportation.”); *Norfolk S. Ry. Co. v. City of Austell*, No. CIVA1:97-CV-1018-RLV, 1997 WL 1113647, at \*6–7 (N.D. Ga. Aug. 18, 1997) (examining the type of facility the city sought to regulate); *Boston & Me. Corp. & Town of Ayer*, STB Finance Docket No. 33971, [2001] Fed. Carr. Cas. (CCH) ¶ 38,352 (STB May 1, 2001) (“[Z]oning ordinances and local land use permit requirements are preempted where the facilities are an integral part of the railroad’s interstate operations.”) (joint petition for declaratory order), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/\\$file/31506.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/$file/31506.pdf) (last visited Dec. 5, 2006).

33. *Boston & Me. Corp.*, [2001] Fed. Carr. Cas. (CCH) ¶ 48,513.

34. *See Borough of Riverdale v. N.Y., Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 389–90 (1999), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/87B3223E8C21403F852567D8006674FA/\\$file/29023.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/87B3223E8C21403F852567D8006674FA/$file/29023.pdf) (last visited Dec. 5, 2006).

35. *See Boston & Me. Corp.*, [2001] Fed. Carr. Cas. (CCH) ¶ 48,513.

36. *See id.*

37. *Borough of Riverdale*, 4 S.T.B. at 389.

38. *See id.*

39. *See id.*

tract.<sup>40</sup> The STB and several courts have suggested, however, that the ICCTA might preempt even “police powers” regulations if they interfere with railroad operations.<sup>41</sup>

Some courts articulate the preemption test somewhat differently from the STB. For example, in *Florida East Coast Railway Co. v. City of West Palm Beach*, the Eleventh Circuit focused more broadly on Congress’s objective in enacting the ICCTA and considered whether the requirement at issue impeded the interstate functioning of the railroad industry.<sup>42</sup> The court found that a city could apply its zoning ordinances to the lessee of railroad property that operated an aggregate distribution center because the zoning ordinance, as applied to the lessee, did not “burden [the railroad] with the patchwork of regulation that motivated the passage of the ICCTA.”<sup>43</sup>

Despite slight differences in the tests adopted by the STB and courts, the approaches are similar in one important respect: the environmental consequences of a railroad company’s activities do not factor into the decision making in any way. The decisions of the Board and the courts depend entirely on the regulations’ relationship to interstate commerce. The fact

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40. See *Green Mountain R.R. v. Vermont*, Civil No. 1:01CV00181, 2003 WL 24051562, at \*5 (D. Vt. Dec. 15, 2003), *aff’d*, 404 F.3d 638, 644–45 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 547 (2005). But see *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003) (“[A] rail carrier that enters into such [voluntary] agreements is not precluded from arguing ‘as a matter of contract interpretation that: (1) unreasonable interference with interstate commerce would result if these voluntary agreements are interpreted [in the manner sought by the plaintiff], and (2) in considering enforcement, the court should give due regard to the impact on interstate commerce.’” (alteration in original) (quoting *Twp. of Woodbridge v. Consol. Rail Corp.*, STB Docket No. 42053, at 3 (STB Mar. 23, 2001), *available at* [http://www.stb.dot.gov/Decisions/readingroom.nsf/UNID/5B027F2DC87BE91485256A0D005890E1/\\$file/31546.pdf](http://www.stb.dot.gov/Decisions/readingroom.nsf/UNID/5B027F2DC87BE91485256A0D005890E1/$file/31546.pdf) (last visited Dec. 5, 2006))).

41. See, e.g., *Green Mountain R.R. v. Vermont*, 404 F.3d at 643 (2d Cir. 2005) (“It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.”); *Friends of the Aquifer*, STB Finance Docket No. 33966, at 4 (STB Aug. 10, 2001) (suggesting that certain “police powers” regulations cannot be applied if they unreasonably restrict the railroad from conducting its operations, or unreasonably burden interstate commerce), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

42. See *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337–39 (11th Cir. 2001).

43. *Id.* at 1339.



that a project poses an unacceptable environmental risk has no legal significance.

Fortunately, federal law provides some environmental relief in select instances. The National Environmental Policy Act<sup>44</sup> (NEPA) requires federal agencies to prepare and consider environmental impact statements before undertaking any major federal action likely to have a significant effect on the environment.<sup>45</sup> Because courts have interpreted the term “major federal action” broadly to include private projects that require federal approval,<sup>46</sup> the STB must comply with NEPA requirements when it issues a federal license.<sup>47</sup> Consequently, whenever a railroad company applies for a federal license and the licensed activity is likely to have a significant effect on the environment, the STB must prepare and consider an environmental impact statement.

NEPA and the federal regulations pertaining to NEPA require the STB, when evaluating railroad projects that may impact the human environment, to (1) “identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;”<sup>48</sup> (2) “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal;”<sup>49</sup> and (3) provide the public with relevant information<sup>50</sup> and “assess and consider [public] comments both individually and collectively.”<sup>51</sup> Additionally, NEPA per-

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44. 42 U.S.C. §§ 4321–4347 (2000).

45. *Id.* § 4332(2)(C) (requiring “all agencies of the Federal Government” to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official”).

46. *See* 40 C.F.R. § 1508.18(a) (2005) (“[Major federal] actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . .”).

47. *See* 49 U.S.C. § 10901(a) (2000); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 533 (8th Cir. 2003) (describing the STB’s approval process, which includes environmental impact assessment under NEPA).

48. 42 U.S.C. § 4332(2)(B).

49. *Id.* § 4332(2)(E).

50. *See* 40 C.F.R. § 1503.1(a)(4) (2005); Council on Environmental Quality, *Statements on Proposed Federal Actions Affecting the Environment*, Guidelines § 10(e), 36 Fed. Reg. 7724, 7726 (April 23, 1971).

51. 40 C.F.R. § 1503.4(a) (2005).

mits the STB to put further restrictions on railroads through the imposition of appropriate environmental mitigation measures not already included in proposed actions or alternatives.<sup>52</sup>

The problem is that the ICCTA only requires railroad companies to get licenses for line extensions, new lines, and acquisition of lines by non-rail carriers.<sup>53</sup> Other projects do not require STB authorization; therefore they are not “major federal actions” and do not trigger NEPA requirements. Put another way, where the STB does not have licensing authority, it has no authority to create and consider an environmental impact statement<sup>54</sup>—even where potential environmental impacts are significant.<sup>55</sup> Importantly, this rule applies regardless of whether the ICCTA preempts state and local laws in a particular instance. Thus, a railroad company could both escape NEPA requirements and be free of environmental restrictions at the local level.<sup>56</sup> Several projects have fallen within this regulatory loophole. These projects have included track upgrades and refurbishments,<sup>57</sup> the extensions or additions of railroad lines that do not allow railroads to enter a new market,<sup>58</sup> and the construction of car unloading facilities<sup>59</sup> and diesel refueling depots.<sup>60</sup> If a railroad project falls within this regulatory loophole, there is little communities can do to protect themselves from environmental damage.

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52. See 40 C.F.R. § 1502.14(f) (2005).

53. See 49 U.S.C. 10901(a) (2000).

54. See Friends of the Aquifer, STB Finance Docket No. 33966, at 3 (STB Aug. 10, 2001) (“Because we lack licensing authority over the project, the environmental review provisions of NEPA do not apply.”), available at [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

55. See *id.* at 8 (“It is clear that the potential significance of an environmental issue, by itself, does not confer regulatory authority on the Board.”).

56. *Id.* at 6.

57. See *Cities of Auburn & Kent*, 2 S.T.B. 330, 331–35 (1997).

58. See *Union Pac. R.R. Co.* 3 S.T.B. 646, 650 (1998).

59. See *Boston & Me. Corp. & Town of Ayer*, STB Finance Docket No. 33971, [2001] Fed. Carr. Cas. (CCH) ¶¶ 48,515–48,517 (STB May 1, 2001) (joint petition for declaratory order), available at [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/\\$file/31506.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/$file/31506.pdf) (last visited Dec. 5, 2006).

60. See *Friends of the Aquifer*, STB Finance Docket No. 33966, at 1–3 (STB Aug. 10, 2001), available at [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

### C. LOCAL, STATE, AND FEDERAL GOVERNMENT INVOLVEMENT WITH LAND USE REGULATION

The STB implies that the regulatory loophole is not as gaping as it might first seem. The Board claims that even where it lacks the authority to conduct an environmental assessment under NEPA, “the lack of licensing and conditioning authority at the Board or at the local level does not mean that there are no environmental remedies under other Federal laws.”<sup>61</sup> This statement is worth analyzing because just as the ICCTA preempts “State law,” it also expressly preempts federal regulation of railroad transportation.<sup>62</sup> Interestingly, courts have not hesitated to apply NEPA to railroad projects.<sup>63</sup> Some companies have argued that the ICCTA preempts other federal environmental laws;<sup>64</sup> however, neither the STB nor the courts have ruled on this issue.<sup>65</sup> However, the STB indicated in dicta that the ICCTA might preempt a federal environmental law if it unduly burdened interstate commerce.<sup>66</sup>

With respect to the loophole at issue in this Note, however, the ICCTA’s preemption of federal law is of limited importance. Because of the special role local governments play in regulating land use, the loophole described above would remain even if the courts were to decide that the ICCTA did not preempt federal law, or preempted it in a very limited number of circumstances.

Local governments and the federal government play very different roles in regulating land use. As noted above, land use regulation falls primarily within the province of the states as

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61. *See id.* at 6.

62. 49 U.S.C. § 10501(b) (2000) (“[T]he remedies provided [by the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under *Federal* or State law.” (emphasis added)).

63. *See, e.g.,* Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 533–34 (8th Cir. 2003).

64. *See Boston & Me. Corp.*, [2001] Fed. Carr. Cas. (CCH) ¶ 48,513 (“[Railroad company] Guilford contends that the [Safe Drinking Water Act] and [the Clean Water Act] are not applicable here; that, if those statutes apply, ICCTA preempts them . . .”).

65. *See Eldredge, supra* note 7, at 574–75.

66. *See, e.g.,* Friends of the Aquifer, STB Finance Docket No. 33966, at 5 (STB Aug. 10, 2001) (“[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes . . . unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.”), available at <http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/file/31505.pdf> (last visited Dec. 5, 2006).

an aspect of their police power.<sup>67</sup> Most states delegate their land use regulation powers to local governments through zoning enabling acts.<sup>68</sup> Pursuant to their delegated powers, local governments typically divide the area they govern into zones and permit certain types of activities, or uses, within each particular zone.<sup>69</sup> Areas may be zoned for dozens of different uses if the government views those uses as compatible with, or at least as not imposing significant external costs on, the other permitted uses.<sup>70</sup>

There are three main ways by which a use that does not fit within any use zone may gain approval. First, a local board may deal with a use on a case-by-case basis through an administrative process that examines any unusual harm the use may cause to neighboring land.<sup>71</sup> If the use successfully passes the administrative review, the reviewing board may issue a special-use permit (also known as a conditional use or special permit).<sup>72</sup> Secondly, a local government may grant approval for a particular use by issuing a zoning “variance.”<sup>73</sup> Administrative boards normally grant variances if prohibiting the use would cause the applicant inevitable hardship due to the distinctive features of his property.<sup>74</sup> The third way a use may gain approval is if the local government amends zoning regulations to permit previously banned uses.<sup>75</sup>

Beyond zoning regulations, many state and local governments have also adopted comprehensive plans that set “goals,

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67. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926) (upholding zoning as a valid exercise of police powers delegated by states to their municipalities); JUERGENSMEYER & ROBERTS, *supra* note 30, § 3.5. Traditionally, states have delegated much of their authority to regulate land use to local governments, though the type of local government varies from counties to cities to towns to other local governing bodies. *Id.* However, some states have made an effort to account for the broad impact of land use decisions by adopting state-wide and even region-wide multiple-state management programs. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 710, 714–15 (4th ed. 2003).

68. JUERGENSMEYER & ROBERTS, *supra* note 30, § 3.5.

69. *Id.* § 4.1.

70. *Id.* § 4.2(B).

71. *Id.* § 5.24(A).

72. *Id.*

73. See *id.* § 5.14. However, courts are frequently reluctant to uphold variances on appeal without clear factual support. *Id.*

74. *Id.*

75. *Id.* § 5.6.

objectives and policies to guide land-use decisionmaking . . . ”<sup>76</sup> In some instances, these comprehensive plans direct planning boards to consider a project’s impact on environmental concerns, such as air and water quality.<sup>77</sup>

The states’ approach to land use regulation is comprehensive. As noted above, local governments divide land under their control into use zones and in that way comprehensively regulate all the uses of all the land within the jurisdiction.<sup>78</sup> Furthermore, from the outset, state zoning enabling acts required that zoning be in “accordance with a comprehensive plan,”<sup>79</sup> and that remains the ideal in local land use regulation today.<sup>80</sup> By contrast, federal environmental laws are narrowly tailored and fragmented.<sup>81</sup> They typically target one type of environmental harm, either directly<sup>82</sup> or indirectly.<sup>83</sup> NEPA is the only

76. *Id.* § 2.9.

77. For example, the Kootenai County Planning Department’s comprehensive plan includes the following focus statement: “Recognizing that human activities have precipitated water and air quality contamination or degradation, the Comprehensive Plan encourages mitigation of existing problems, while also promoting future development practices which benefit water and air quality.” See Kootenai County Idaho Comprehensive Plan, <http://www.co.kootenai.id.us/departments/planning/complan/goal1.asp> (last visited Dec. 5, 2006).

78. JUERGENSMEYER & ROBERTS, *supra* note 30, § 4.2.

79. *Id.* § 2.11. The Standard State Zoning Enabling Act, upon which all fifty states substantially patterned their enabling acts, *id.* § 3.6, requires local governments to make zoning decisions “in accordance with a comprehensive plan,” *id.* § 2.11.

80. Many courts have found that state zoning enabling acts do not actually mandate the development of a comprehensive plan. *Id.* (discussing *Kozesnick v. Montgomery Twp.*, 131 A.2d 1 (N.J. 1957)). Nevertheless these courts have emphasized that zoning enabling acts requires local governments to take a comprehensive approach to land use regulation. See, e.g., *Kozesnick*, 131 A.2d at 7 (“[I]t may be said for present purposes that ‘plan’ connotes an integrated product of a rational process and ‘comprehensive’ requires something beyond a piecemeal approach . . .”).

81. See Richard B. Stewart, *A New Generation of Environmental Regulation*, 29 CAP. U. L. REV. 21, 29–30 (2001).

82. See PERCIVAL ET AL., *supra* note 67, at 705. For example, section 404 of the Clean Water Act requires a permit “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (2001); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(2) (2001) (prohibiting strip mining in areas where it creates imminent danger to the health or safety of the public or where it is reasonably expected to cause significant environmental harm); Safe Drinking Water Act, 42 U.S.C. § 300h(b)(1)(A)–(B) (2001) (requiring landowners to obtain a permit from the State before effecting an underground injection that may endanger drinking water sources). In certain instances, the Endangered Species Act also prohibits private landowners from using their land in a way that significantly

federal statute that approaches the comprehensiveness of local land use regulation. It is unique because of its broad application and the way that it targets environmental impacts generally.<sup>84</sup>

In sum, with the exception of NEPA, federal environmental laws are extremely narrow in scope. Congress has anticipated and addressed specific problems, but has left the bulk of land use management to the states. Considering the differences between local and federal law, courts and legislators should not assume that, in the absence of state and local laws, federal laws provide adequate environmental protection for local communities.

## II. WHERE RAILROAD PROJECTS DO NOT TRIGGER NEPA REVIEW UNDER THE ICCTA, RAILROAD COMPANIES ARE FREE TO CREATE SIGNIFICANT RISKS FOR COMMUNITIES.

As noted above, some railroad projects are subject neither to NEPA requirements nor to local zoning and land use restrictions.<sup>85</sup> The STB claims that, while the Board lacks licensing authority over these projects and therefore cannot conduct an environmental assessment under NEPA, other federal laws may provide environmental remedies.<sup>86</sup> However, although federal laws may provide relief in some instances, there are situa-

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modifies the habitat of endangered species. See 16 U.S.C. § 1538(a)(1)(B) (2001) (making it unlawful to “take any [endangered] species”); 50 C.F.R. § 17.3 (2005) (“Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”).

83. See JUERGENSMEYER & ROBERTS, *supra* note 30, §§ 11.2–.6 (giving in-depth descriptions of federal environmental laws that impact land use decisions); PERCIVAL ET AL., *supra* note 67, at 705–08 (listing several federal statutes that indirectly influence land use patterns).

84. See Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1677 (1993) (“Among modern environmental statutes, NEPA is unique in its brevity, its scope, and its virtually exclusive emphasis on procedures and broad values rather than standards and narrow requirements.”).

85. See *Flynn v. Burlington N. Santa Fe Corp. (BNSF)*, 98 F. Supp. 2d 1186, 1188–89 (E.D. Wash. 2000).

86. Friends of the Aquifer, STB Finance Docket No. 33966, at 6 (STB Aug. 10, 2001), available at [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

tions where federal laws will not adequately substitute for local land use regulations. This section documents one such case and demonstrates how the ICCTA disrupts the typical power structure that otherwise exists to protect communities.

A. CASE STUDY: RAILROAD REFUELING STATION ATOP THE SPOKANE VALLEY-RATHDRUM PRAIRIE AQUIFER

On August 10, 2001, the STB issued a ruling of special significance to people living in eastern Washington and northern Idaho. The Burlington Northern and Santa Fe Railway (BNSF) planned to build a refueling depot in Hauser, Idaho directly atop the Spokane Valley-Rathdrum Prairie Aquifer, a sole source<sup>87</sup> aquifer that provides water for more than four hundred thousand people in the area.<sup>88</sup> While BNSF claimed that “monitoring systems, concrete barriers and underground plastic liners would guard against [drinking water] contamination,”<sup>89</sup> local experts expressed doubt.<sup>90</sup> Community groups pointed to BNSF’s poor environmental record.<sup>91</sup> The health districts of North Idaho and Spokane, Washington came out against the depot, fearing its impact on public health,<sup>92</sup> and the Idaho Division of Environmental Quality noted that the spill scenarios BNSF initially modeled used conservative assumptions.<sup>93</sup>

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87. The Environmental Protection Agency (EPA) officially named the Spokane Valley-Rathdrum Prairie Aquifer a sole source aquifer in 1978. See Robert Harper, *Valley Aquifer Said Water ‘Sole Source,’* SPOKESMAN-REV. (Spokane, Wash.), Feb. 7, 1978, at A1. “Sole Source Aquifer designations are one tool to protect drinking water supplies in areas with few or no alternative sources to the ground water resource, and where if contamination occurred, using an alternative source would be extremely expensive.” Sole Source Aquifer Protection Program FAQs, <http://www.epa.gov/reg3wapd/ssa/faq.htm#Q1> (“[A]quifers must supply at least 50 percent of the drinking water to persons living over the aquifer; there can be no other feasible sources of drinking water that could replace the aquifer; and there must be clearly definable aquifer boundaries.”) (last visited Dec. 5, 2006).

88. Zaz Hollander, *BNSF Consultant Revises Diesel Spill Scenarios*, SPOKESMAN-REV. (Spokane, Wash.), Aug. 12, 1999, at B1.

89. *Id.*

90. See *id.*; Zaz Hollander, *Depot Foes Challenge BN Studies*, SPOKESMAN-REV. (Spokane, Wash.), Nov. 17, 1999, at A11.

91. See Ken Olsen, *Depot Foes Point to BN Track Record: 8 of 14 Montana Stations Polluted Ground Water*, SPOKESMAN-REV. (Spokane, Wash.), May 12, 1998, at A1.

92. See Zaz Hollander, *Health District Opposes Fuel Depot*, SPOKESMAN-REV. (Spokane, Wash.), Sept. 17, 1999, at B1.

93. See Letter from John Sutherland, Reg’l Manager of Remediation, State of Idaho Div. of Env’tl. Quality, to Mark P. Stehly, Burlington N. Santa

The STB determined that, while state and local government regulations were preempted under the ICCTA's section 10501(b), the Board lacked licensing authority over the project and therefore could not order an environmental review under NEPA.<sup>94</sup> In deciding that it did not have the authority to order an environmental review of BNSF's project, the STB emphasized that the railroad company must comply with federal environmental statutes such as the Clean Water Act and the Safe Drinking Water Act, provided the statutes were not applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.<sup>95</sup>

Even *if* experts, agencies, citizens' groups, and BNSF agreed the refueling facility was sure to pollute the aquifer because it lacked adequate environmental safeguards, no federal law would provide the means to prevent the project. The two most likely candidates mentioned by the Board, the Clean Water Act and the Safe Drinking Water Act, would not come into play. The Clean Water Act essentially prohibits the discharge of pollutants into navigable waters.<sup>96</sup> BNSF did not plan to discharge anything into any navigable waters. Similarly, the Safe Drinking Water Act would not affect the project because it requires states, not private actors, to maintain certain drinking water standards.<sup>97</sup> Federal laws simply fail to provide the often local remedies that the public sought in this instance: an assessment of environmental risks and an assurance that the project's potential impact on public health would receive due con-

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Fe 1 (Nov. 2, 1999) (on file with author).

94. Friends of the Aquifer, STB Finance Docket No. 33966, at 6 (STB Aug. 10, 2001), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

95. *See id.*

96. *See* 33 U.S.C. § 1313 (2000).

97. *See* 42 U.S.C. §§ 300g-1 to g-3 (2001). While it is possible to argue that the ICCTA does not preempt local regulations that merely implement a federal law such as the Safe Drinking Water Act (SDWA), the STB has rejected such arguments. *See* Boston & Me. Corp. & Town of Ayer, STB Finance Docket No. 33971, [2001] Fed. Carr. Cas. (CCH) ¶ 48,513 (STB May 1, 2001) (joint petition for declaratory order) ("[E]ven if [the Clean Water Act and the Safe Drinking Water Act] were found to be applicable, it appears that Ayer is simply using them as a pretext to do what Congress expressly precluded: interfere with interstate commerce by imposing a local permitting or environmental process as a prerequisite to the railroad's ability to conduct its operations."), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/\\$file/31506.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/874CABD848AA78E6852569BD00685772/$file/31506.pdf) (last visited Dec. 5, 2006).



sideration in the decision-making process. Once a significant oil spill has occurred, it is extremely difficult, if not impossible, to restore contaminated groundwater to a condition suitable for beneficial use.<sup>98</sup> Contrary to the STB's suggestions, there is no federal environmental law outside of NEPA that considers the benefits of stopping aquifer pollution before it occurs.

Four months after the refueling depot opened on August 31, 2004, Idaho regulators reported that contaminated wastewater had reached the aquifer due to a broken plastic pipe at the BNSF depot.<sup>99</sup> Regulators discovered several other leaks in the ensuing months; finally, on February 23, 2005, the Idaho Department of Environmental Quality succeeded in obtaining an emergency court order closing the depot until all the problems could be fixed.<sup>100</sup> Between 2,000 and 3,000 gallons of diesel and motor oil had leaked into the aquifer—an amount too small to be considered a public health threat.<sup>101</sup> BNSF paid \$7 million to fix the problem, a \$100,000 fine, and Idaho's legal and overtime costs.<sup>102</sup>

Would the outcome have been different under a local regulatory scheme? A close look at the events leading up to the construction of the refueling facility shed some light on this inquiry. BNSF voluntarily submitted to the local permit approval process for the construction and operation of a locomotive fueling facility in Hauser, Idaho, atop the aquifer.<sup>103</sup> The company

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98. Linly Ferris & David Rees, *CERCLA Remedy Selection: Abandoning the Quick Fix Mentality*, 21 *ECOLOGICAL L.Q.* 785, 828–29 (1994). Removal of pollutants is particularly difficult where they become trapped in the solid layers of the subsurface surrounding the aquifer and are continually reabsorbed into the water. *Id.* at 829–31.

99. Dan Hansen, *Week in Review*, SPOKESMAN-REV. (Spokane, Wash.), Dec. 26, 2004, at B3.

100. James Hagengruber, *Depot Gets Fix; Cracks in Credibility Remain*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 22, 2005, at A17.

101. Rocky Barker, *DEQ Chief Can Be Tough When She Needs to Be*, IDAHO STATESMAN (Boise, Idaho), June 6, 2005, at 1.

102. *Id.*; Idaho Dept. of Env'tl. Quality, *Overview of Water Quality in the Coeur d'Alene Region: DEQ/BNSF Agreement to Protect Ground Water Quality*, [http://www.deq.state.id.us/about/regions/cro\\_bnsf.cfm](http://www.deq.state.id.us/about/regions/cro_bnsf.cfm) (last visited Dec. 5, 2006).

103. BNSF may have volunteered because it was concerned about community relations. See Ken Olsen, *Railroad Hires PR Firm to Address Aquifer Concerns*, SPOKESMAN-REV. (Spokane, Wash.), July 14, 1998, at A1 (reporting that BNSF hired a public relations firm “to help [them] better assess concerns of the community”).

applied for two conditional use permits,<sup>104</sup> one for the above-ground storage of more than twenty thousand gallons of fuel and one for a public utility complex facility.<sup>105</sup> The Kootenai County Board of County Commissioners, a three-person panel presiding over land use and other issues in the county where the BNSF depot would be built, noted that the BNSF property was zoned as industrial under the Kootenai County Zoning Ordinance.<sup>106</sup> As such, the property was “suitable for manufacturing and processing of all types,”<sup>107</sup> but not for the storage of petroleum. The Board of Commissioners recognized that the storage of petroleum was therefore a conditional rather than an outright permitted use and consequently must conform to the conditional use standards set forth in the Zoning Ordinance.<sup>108</sup>

After examining BNSF’s proposal, the Commissioners imposed thirty-three conditions on the permit and approved the plan, finding not only that the project was in compliance with the performance standards of the County’s Zoning Ordinance, but also that it was in conformance with the County’s Comprehensive Plan and was in the public interest.<sup>109</sup> The Commis-

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104. Kootenai County Zoning Ordinance No. 348 defines “conditional use” as:

[a] use listed among those classified in any given zone but permitted to locate only after review and which requires a special degree of control to make such use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities and facilities.

Kootenai County Zoning Ordinance No. 348, Art. 2, § 2.02 (Feb. 8, 2005), available at <http://www.co.kootenai.id.us/departments/planning/ordinance.asp> (follow “Ordinance No. 348” hyperlink) (last visited Dec. 1, 2006). This definition was operative when the Board made its decision. See County Commissioners of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, Case No. C-999-99, at \*19 (Apr. 19, 2000) (copy of decision on file with author and the Minnesota Law Review).

105. See County Commissioners of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, at \*1. Definitions of the two permit types can be found in the Kootenai County Zoning Ordinance. Kootenai County Zoning Ordinance No. 348, Art. 2, § 2.02 (Feb. 8, 2005), available at <http://www.co.kootenai.id.us/departments/planning/ordinance.asp> (follow “Ordinance No. 348” hyperlink) (last visited Dec. 1, 2006).

106. *Id.* at \*19.

107. *Id.* (quoting Kootenai County Zoning Ordinance No. 348, Art. 11, § 11.00).

108. See County Commissioners of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, at \*19.

109. See *id.* at \*19, 28–35. Under the Kootenai County Zoning Ordinance, “conditional uses, because of their public convenience and necessity, may be permitted only after finding that the conditional use proposed will be in con-

sioners' decision indicates that the spill at the depot would have occurred even if the ICCTA had not preempted local zoning laws. Perhaps the spill would have been worse if the County had not imposed the thirty-three conditions on the project—conditions enforceable despite the ICCTA's preemption provisions.<sup>110</sup> But, taking the Commissioners' decision at face value, one could conclude that the ICCTA preemption provisions were not responsible for the leak.

A more probing look at the permit approval process, however, indicates that perhaps the Commissioners' decision should not be taken at face value. There is some evidence to suggest that the Kootenai County Commissioners approved BNSF's proposal primarily because they were aware of the ICCTA's preemption provision. The final vote on the permit was two Commissioners in favor of the project and one against.<sup>111</sup> One of the Commissioners who voted in favor of the project told a local paper that the preemptive effect of federal law influenced his decision: "the county could lose the right to apply any conditions to depot operations if it rejected the railroad's application and BNSF turned to the federal Surface Transportation Board for relief."<sup>112</sup> Defending his decision, the commissioner said, "If something is going to be imposed on you, you should at least try to control the game. . . ."<sup>113</sup> Despite giving the public opportunities to voice its concerns at public hearings, the Commissioners and other County representatives appeared to conduct much of the depot negotiations in closed meetings with BNSF executives.<sup>114</sup> These facts indicate that this was not the typical conditional use permit application and approval process in that BNSF was not really seeking approval.

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formance with the Comprehensive Plan and will be in the public interest." Kootenai County Zoning Ordinance No. 348, Art. 30, § 30.01(A)(2) (Feb. 8, 2005), *available at* <http://www.co.kootenai.id.us/departments/planning/ordinance.asp> (last visited Dec. 1, 2006).

110. *See* Twp. of Woodbridge v. Consol. Rail Corp., STB Docket No. 42053, at 5 (STB Mar. 23, 2001) (enforcing a contract into which a railroad voluntarily entered), *available at* [http://www.stb.dot.gov/Decisions/readingroom.nsf/UNID/5B027F2DC87BE91485256A0D005890E1/\\$file/31546.pdf](http://www.stb.dot.gov/Decisions/readingroom.nsf/UNID/5B027F2DC87BE91485256A0D005890E1/$file/31546.pdf) (last visited Dec. 5, 2006).

111. County Commissioners of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, at \*35.

112. Zaz Hollander, *Depot Above Aquifer Approved*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 7, 2000, at A1.

113. *Id.*

114. Alison Boggs, *Railroad Proposes Depot-Lite*, SPOKESMAN-REV. (Spokane, Wash.), June 29, 1999, at A1.

The company would make the final decision: if the County's conditions were too restrictive, BNSF could simply withdraw its application and build the depot on its own terms.

Prior to the Commissioners' final decision, the County Board appointed a hearing examiner to hold a public hearing and issue a recommendation on the permit application.<sup>115</sup> Because the examiner's decision would have no binding effect and therefore would be unlikely to cause BNSF to withdraw its application, the examiner was less restricted by BNSF's demands than were the Commissioners. Consequently, her conclusions are worth noting as they arguably demonstrate a more typical application of local and state law to BNSF's permit.

The hearing examiner recommended to the Kootenai County Board of Commissioners that BNSF's application for the conditional use permit be denied.<sup>116</sup> She found that although the proposal was in conformance with the Zoning Ordinance's technical requirements and the technical requirements of other agency regulations, it did not satisfy the requirements of the County's Comprehensive Plan.<sup>117</sup> The examiner focused on Goal Twenty of the Comprehensive Plan, which aims to "[p]rotect water quality to ensure adequate quantity and quality of drinking water to meet the current and future needs in the County,"<sup>118</sup> and recommended that the Commissioners require BNSF to take several actions in order to obtain approval, including moving the fuel tanks to a location that was not over the aquifer.<sup>119</sup> Had the Commissioners followed the recommendations of the hearing examiner, as they usually do,<sup>120</sup> the County very likely would have avoided aquifer contamination.

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115. Thomas Clouse, *Examiner Advises Against Depot*, SPOKESMAN-REV. (Spokane, Wash.), Jan. 4, 2000, at A1.

116. See Hearing Examiner of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, Case No. C-999-99, at \*18 (Dec. 29, 1999).

117. See *id.* at \*11.

118. Comprehensive Plan, Goal 20, <http://www.co.kootenai.id.us/departments/planning/complan/goal20.asp> (last visited Dec. 1, 2006); Hearing Examiner of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, Case No. C-999-99, at \*14-16.

119. Hearing Examiner of Kootenai County, Idaho, *In re Burlington N. & Santa Fe R.R.*, at \*18-19.

120. One Commissioner estimated that, in the three years preceding the hearing examiner's recommendation regarding the BNSF depot, the Commissioners followed the hearing examiners' recommendations in about eighty percent of the cases presented. See Clouse, *supra* note 115. He went on to conclude that "[the] commissioners seldom go against the hearing examiner." *Id.*

It is impossible to know exactly what would have occurred in the absence of the ICCTA's preemption of local and state laws. The hearing examiner's recommendation gives some insight into the normal application process; however, she may have made a more restrictive recommendation than normal to counterbalance the enormous influence of BNSF, given the ICCTA's preemptive effect. It is also impossible to guess how a NEPA environmental assessment would have affected the project. Nonetheless, this case study demonstrates that, while corporate citizens may make an effort to cooperate with local officials and respond to public demands, the ICCTA's preemption provision puts railroad companies in the driver's seat where it comes to irreplaceable, vital public resources.

### III. ELIMINATING THE LOOPHOLE

While some courts have permitted local governments to apply environmental and land use regulations to railroads, no court has interpreted the ICCTA in a way that will close the loophole. Furthermore, the Ninth and Second Circuits have explicitly rejected such an interpretation.<sup>121</sup> Consequently, Congress must take action to protect communities. This Note demonstrates that Congress should enact a modified version of NEPA in order to close the regulatory gap.

#### A. THE STB AND COURTS HAVE RESISTED ELIMINATING THE LOOPHOLE THROUGH INTERPRETATION.

The STB and the courts have referred to projects falling within the ICCTA regulatory loophole as "ancillary" projects because they are outside the scope of STB's licensing authority and therefore do not trigger NEPA requirements.<sup>122</sup> This term is confusing because courts have also used the term "ancillary" to refer to projects that are ancillary—that is, projects not integral—to railroad operations, and that therefore may be the subject of local government regulation.<sup>123</sup> A court will only close

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121. See *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 644–45 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 547 (2005) (refusing to distinguish environmental regulations from economic regulations); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (rejecting the same distinction).

122. See, e.g., *Friends of the Aquifer*, STB Finance Docket No. 33966, at 3–4 (STB Aug. 10, 2001), *available at* [http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/\\$file/31505.pdf](http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/4FF2DCB99468FEB785256A960055F496/$file/31505.pdf) (last visited Dec. 5, 2006).

123. E.g., *In re Vt. Ry.*, 769 A.2d 648, 653 (Vt. 2000) ("[T]he salt shed at is-

the loophole if it interprets the ICCTA in a way that allows local governments to apply environmental and land use laws to all “ancillary” projects or facilities that currently fall within the loophole. If a court merely holds that a local government may apply environmental and land use laws to projects that are ancillary to railroad operations, the regulatory gap will persist. Under such a paradigm, local governments will not be able to regulate projects that are integral to railroad operations, *even if* the project poses a significant environmental risk and does not trigger NEPA review because the project requires no STB license.

The STB and courts could close this problematic loophole by determining that environmental and land use regulations, by their nature, are simply not covered by the ICCTA’s preemption provision. The plain language and the legislative history of the ICCTA support such an interpretation if the STB and courts ignore the economic impacts of environmental and land use regulations and instead focus on the “non-economic” character of these laws.<sup>124</sup>

The plain language of the ICCTA’s express preemption provision gives the STB exclusive jurisdiction not over “rail transport,” but instead over “regulation of rail transport.”<sup>125</sup> This suggests that the ICCTA preempts only laws that directly manage or govern rail transport and does not preempt environmental and land use laws aimed at protecting public health and the environment.<sup>126</sup> Additionally, the House Transportation and Infrastructure Committee Report on the ICCTA notes that Congress’s intent in enacting the legislation was to “occupy . . . the entire field of *economic* regulation of the interstate rail transportation system.”<sup>127</sup> Thus, if courts were to characterize environmental and land use regulations as “non-economic,” the ICCTA’s preemption provision would not interfere with local environmental protection efforts.

Unfortunately, no court has categorically permitted the application of environmental and land use regulations. Nota-

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sue is ancillary to the operations of the rail line.”).

124. See Eldredge, *supra* note 7, at 588–89.

125. 49 U.S.C. § 10501(b) (2000).

126. See Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001); Eldredge, *supra* note 7, at 588–89.

127. H.R. REP. NO. 104-311, at 95–96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807–08 (emphasis added); see also Fla. E. Coast Ry., 266 F.3d at 1337–38; Eldredge, *supra* note 7, at 588–89.

bly, the Eleventh Circuit suggested that it might be willing to take such an approach in *Florida East Coast Railway Co. v. City of West Palm Beach* when it determined that the ICCTA did not preempt West Palm Beach's zoning ordinances as applied to the lessee of railroad property.<sup>128</sup> After examining the plain language and legislative history of the ICCTA, the court declared that the city could apply its zoning law because "West Palm Beach's zoning requirements do not impede the interstate functioning of the railroad industry."<sup>129</sup> But the court ultimately emphasized that the ICCTA might preempt the city's zoning ordinances as applied directly to a railroad rather than to a lessee. Thus the court declined to adopt a per se rule—one permitting the application of zoning laws categorically—that would close the regulatory loophole.<sup>130</sup> Aside from one exception, discussed in the next paragraph, all courts have made initial determinations concerning local regulations' impact on railroad operations before permitting local governments to regulate.

Admittedly, courts have been willing to categorically apply one type of local regulation regardless of its impact on railroad operations. Where local governments seek to apply laws concerning "railroad safety," some courts have ignored the regulations' impact on the industry. For example, in *Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Commission*, a Pennsylvania court recognized that states, within the traditional police power to regulate public safety, may allocate to the railroad the costs of constructing, maintaining, and improving grade crossings.<sup>131</sup> Because railroad safety falls into the broader category of public safety, environmental laws that aim to promote public safety should also categorically withstand ICCTA preemption.

Courts, however, emphasize the significance of the Federal Railroad Safety Act (FRSA),<sup>132</sup> an Act which the Supreme Court has said displays "considerable solicitude" for state

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128. *Fla. E. Coast Ry.*, 266 F.3d at 1337–39.

129. *Id.* at 1339.

130. *Id.* at 1332 ("We are not called upon to decide whether federal law would constrain the City's exercise of its police power to limit [the railroad's] operations should it engage in an aggregate distribution business in exactly the same manner as [the lessee].").

131. See 778 A.2d 785, 791–92 (Pa. Commw. Ct. 2001); *Home of Econ. v. Burlington N. Santa Fe R.R.*, 694 N.W.2d 840, 846 (N.D. 2005) ("[T]he ICCTA does not explicitly preempt state law regarding grade crossings . . .").

132. 49 U.S.C. §§ 20101–20153 (2000).

law.<sup>133</sup> One court explained:

[O]ne can only presume that if there existed a federal law preserving an explicit sphere of state authority for railroad *environmental* laws, as the FRSA does in the area of rail safety, [a case in which the court found that the ICCTA preempted local environmental laws] may have come out differently.<sup>134</sup>

Thus courts and the STB are likely to continue distinguishing railroad safety laws from environmental laws and to refuse to apply the latter without first considering the laws' impact on railroad operations under the ICCTA preemption provision.

Significantly, the Ninth and Second Circuits flatly rejected the argument that environmental laws escape ICCTA preemption because of their "non-economic" nature.<sup>135</sup> The Ninth Circuit declared that the nature of a law does not determine whether it is preempted under the ICCTA,<sup>136</sup> and both courts suggested that such a system would be unworkable because the economic effects of environmental regulations make it impossible to clearly distinguish between economic and environmental regulations.<sup>137</sup> The Second Circuit adopted the Ninth Circuit's reasoning that "if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line."<sup>138</sup>

#### B. A STATUTORY FIX FOR THE REGULATORY LOOPHOLE

Given the reluctance of the STB and courts to interpret the ICCTA in a way that eliminates the regulatory loophole, and given the difficulty of defining terms like "economic," it will likely take a statutory amendment to ensure that railroad projects will not pose unacceptable risks to communities. Congress could take a variety of approaches. It could eliminate the preemption provisions altogether; however, this would significantly undermine Congress's goal of creating a uniform system

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133. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662, 665 (1993).

134. *CSX Transp., Inc. v. Williams*, No. Civ. A. 05-338 (EGS), 2005 WL 902130, at \*12 n.20 (D.D.C. Apr. 18, 2005), *rev'd*, 406 F.3d 667 (D.C. Cir. 2005).

135. See *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 547 (2005); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

136. *Auburn*, 154 F.3d at 1031.

137. *Green Mountain*, 404 F.3d at 644; *Auburn*, 154 F.3d at 1031.

138. *Green Mountain*, 404 F.3d at 644 (quoting *Auburn*, 154 F.3d at 1031).



of regulation.<sup>139</sup> If Congress created a more limited exception, such as permitting local governments to apply zoning, land use, and environmental laws, Congress would face the added difficulty of defining the terms zoning, land use, and environmental.

With these challenges in mind, the best way to close the loophole is to subject railroad projects to more STB scrutiny. Congress could give the STB more authority to review and approve projects under the ICCTA. For example, Congress might require companies to obtain a license before undertaking any railroad project that is likely to have a significant effect on the environment.<sup>140</sup> Like the STB's issuance of other licenses under the ICCTA,<sup>141</sup> the issuing of such an environmental effects license would qualify as a "major federal action[]" and trigger a NEPA review.<sup>142</sup> Thus, when a railroad company applies for an environmental effects license, the STB would prepare and consider an environmental impact statement pursuant to NEPA and issue a license accordingly.<sup>143</sup> If a railroad company ignored its obligation to apply for an "environmental effects" license, local governments or concerned citizens could petition the STB. Thus, citizens would gain some assurance that a neutral party would consider environmental impacts in the decision-making process.

Because commentators have leveled so much criticism at NEPA,<sup>144</sup> it is worth exploring another potential solution. Con-

139. See H.R. REP. NO. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.A.N. 793, 808 ("Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation . . . is intended to . . . be completely exclusive. Any other construction would undermine the uniformity of Federal standards . . .").

140. See Eldredge, *supra* note 7, at 585 ("Congress could expand the STB's licensing authority to encompass a broader range of railroad activities.").

141. See 49 U.S.C. § 10901-10907 (2000).

142. 42 U.S.C. § 4332(2)(C) (2000).

143. See *id.*

144. See, e.g., WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 811-12 (2d ed. 1994); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245 (2000); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74 (2003); Oliver A. Houck, *Is That All?*, 11 DUKE ENVTL. L. & POL. F. 173 *passim* (2000) (reviewing LYNTON KEITH CALDWELL, A REVIEW OF THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE (1998); NEPA TASK FORCE, THE NEPA TASK FORCE REP. TO THE COUNCIL ON ENVTL. QUALITY (2003), <http://ceq.eh.doe.gov/ntf/report/finalreport.pdf> (last visited Dec. 5, 2006).

gress could seize this opportunity to experiment with a modified version of NEPA that would apply directly to railroad companies. As noted above, NEPA requires federal agencies, as opposed to private companies, to prepare and consider environmental impact statements before undertaking any “major Federal action[]” likely to have a significant effect on the environment.<sup>145</sup> Normally—because of the “major Federal action[]” stipulation—NEPA only applies to a private project if it benefits from federal funding or if it requires a federal license.<sup>146</sup> For example, NEPA does not require agencies to review the environmental impacts of railroad projects undertaken by private companies unless the project requires a federal license, such as a license for a line extension or a new line.<sup>147</sup> However, because railroads are an instrumentality of interstate commerce, Congress could enact a NEPA-like statute that would apply directly to railroad companies.<sup>148</sup>

The railroad-specific NEPA would require the railroad company itself—rather than the STB—to (1) determine if a project is likely to have a significant effect on the environment and (2) prepare and consider an environmental impact statement if the project is likely to have significant environmental effect. As in NEPA, Congress would require the railroad company, in deciding on a course of action, to consider environmentally preferable alternatives,<sup>149</sup> to provide the public with relevant information,<sup>150</sup> and to assess and consider public comments.<sup>151</sup> It

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145. 42 U.S.C. § 4332(2)(C) (“[A]ll agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . .”).

146. See 40 C.F.R. § 1508.18(a) (2005) (“[Major Federal actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . .”).

147. See 49 U.S.C. § 10901(a) (2000); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 533 (8th Cir. 2003) (describing the STB’s approval process, which includes environmental impact assessment under NEPA).

148. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (“Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . .”).

149. See 42 U.S.C. § 4332(2)(E).

150. See 40 C.F.R. § 1503.1(a)(4); Council on Environmental Quality, *Statements on Proposed Federal Actions Affecting the Environment*, Guidelines § 10(e), 36 Fed. Reg. 7724, 7726 (Apr. 23, 1971) (“In accord with [NEPA,] agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information [regarding] programs with envi-

is true that such a proposal would authorize railroad companies both to determine whether a project is likely to have a significant effect on the environment and to decide on an appropriate course of action. However, citizens and local governments would be able to challenge such decisions in courts or before the STB.

To address criticisms and experiment with changes, the railroad-specific NEPA should differ from NEPA in two important respects. First, the new statute should impose substantive, as well as procedural, requirements. Second, the statute should require railroad companies to develop and implement a monitoring plan whenever their initial finding of no significant environmental impact is based on proposed mitigation measures.

### 1. Substantive Requirements

The Supreme Court interprets NEPA as creating only procedural requirements.<sup>152</sup> Courts reviewing an agency's compliance with NEPA may consider only whether the agency took the proper procedural steps and not whether the agency's decision adequately protects the environment.<sup>153</sup> Simply put, under NEPA, courts may only review whether the agency adequately considered the environmental consequences of its decision:<sup>154</sup>

[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."<sup>155</sup>

Congress should take note that, under a similar railroad-specific NEPA, railroad companies would be free to make unwise and costly environmental decisions as long as they followed proper procedure. Accordingly, Congress should incorpo-

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ronmental impact . . .").

151. 40 C.F.R. § 1503.4(a).

152. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision . . ." (citations omitted)).

153. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980).

154. See Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 220 (1992).

155. *Strycker's*, 444 U.S. at 227–28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

rate substantive requirements into any railroad-specific NEPA. There are several ways to accomplish such a goal. For example, Congress could impose substantive obligations on railroad companies by explicitly requiring them either to (1) choose a plan that does the least environmental damage or (2) mitigate the harmful effects of a proposed action when other important interests tip the scales in favor of taking the action, despite the environmental harm which will result.<sup>156</sup> Alternatively, Congress could simply require railroad companies to give due consideration to preventing environmental damage, leaving courts to determine how much consideration certain environmental risks warrant.<sup>157</sup>

## 2. Monitoring Mitigation Efforts

Federal agencies frequently avoid preparing the detailed and time-consuming environmental impact statements required by NEPA. They accomplish this by performing a preliminary review of the project, known as an environmental assessment, and determining that the project is not likely to have a significant impact on the environment.<sup>158</sup> Such a finding is called a “finding of no significant impact” or a FONSI.<sup>159</sup> FONSI have become the rule rather than the exception under NEPA: federal agencies prepare approximately five hundred environmental impact studies (EIS) annually, as compared to fifty thousand environmental assessments that lead to FONSI.<sup>160</sup>

Sometimes, when making a FONSI, agencies rely on mitigation measures. That is, agencies “reduce expected environmental impacts below the EIS-triggering threshold level of ‘significant’” in order to “avoid the cost and administrative burden associated with a full [EIS].”<sup>161</sup> Critics stress that agencies ig-

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156. See Ferester, *supra* note 154, at 211 (discussing the way NEPA ought to have been interpreted).

157. *Id.* at 248–49 (discussing a New York law similar to NEPA that requires public agencies to give “due consideration” to environmental consequences, thus “ensur[ing] that agencies focus their attention not only on producing environmental documents, but also on the prevention of environmental damage”).

158. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 903, 909–10 (2002).

159. *Id.* at 903.

160. *Id.* at 909–10.

161. *Id.* at 908.

nore the initial, unmitigated state of project proposals and use the mitigated FONSI on projects for which Congress intended to trigger a full EIS.<sup>162</sup> When agencies avoid formal EIS requirements, they have less information on which to base their decisions, including information that is normally supplied by the public in the EIS development process.<sup>163</sup> Nevertheless, courts generally uphold agencies' mitigated FONSI determinations.<sup>164</sup>

Some commentators, however, recognize that the mitigated FONSI offers important benefits that should not be ignored—namely significant cost and time savings—and that the procedure can be adjusted so as to provide adequate environmental protections.<sup>165</sup> In his article, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, Professor Bradley Karkkainen closely examines the mitigated FONSI and offers several recommendations for improvement.<sup>166</sup> While Congress might consider many of his proposals in revising NEPA, one is particularly relevant to the railroad-specific NEPA contemplated here.

Karkkainen notes that ordinarily after an agency issues a mitigated FONSI, the agency is under no obligation to follow up on its decision.<sup>167</sup> Consequently, if the mitigation measures turn out to be inadequate and the environmental impacts of the project are significant, concerned parties have no recourse.<sup>168</sup> Congress, however, might easily correct this problem. Consistent with Karkkainen's proposal, whenever a railroad company avoids preparing an EIS by using a mitigated FONSI, Congress should require the company to develop and implement a monitoring plan. The plan would "verify over the life of the project that the actual environmental impacts remain[] below the statutory threshold level of 'significant.'"<sup>169</sup> If the environ-

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162. See, e.g., *id.* at 934.

163. Peter J. Eglick & Henryk J. Hiller, *The Myth of Mitigation Under NEPA and SEPA*, 20 ENVTL. L. 773, 776 (1990).

164. See Karkkainen, *supra* note 158, at 932 n.129 (listing cases in which courts have upheld agencies' mitigated FONSI determinations).

165. See, e.g., *id.* at 934–37.

166. See *id.*

167. See *id.* at 927.

168. See *id.*

169. *Id.* at 943. The meaning of the word "significantly," as used in NEPA, depends on a variety of factors. See 40 C.F.R. § 1508.27 (2005); Dinah Bear, *NEPA at 19: A Primer on an 'Old' Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10064 (1989).

mental impacts subsequently rise to the level of significant, Congress would require the company either to prepare a full EIS or to revise the mitigation measures to adequately reduce the project's environmental impact.<sup>170</sup>

By enacting such a railroad-specific NEPA with the two adjustments highlighted above, Congress can close the regulatory loophole created by the ICCTA while minimizing the burdens placed on railroad companies and the STB. Additionally, the proposed statute would allow Congress to experiment with NEPA reform on a small segment of projects, thus avoiding the potential cumulative effects of mistakes made on a grander scale.

### CONCLUSION

While state and local governments normally control land use decisions, the ICCTA generally preempts local authority where those decisions affect railroad companies. NEPA compels the STB to perform an assessment of environmental impacts before authorizing railroads to undertake projects; however, there are some railroad projects over which the STB lacks licensing authority. Where the STB lacks licensing authority, the ICCTA—despite preempting state and local law—does not authorize the STB to conduct a NEPA analysis and prevent environmental harm. If a railroad project falls within this loophole, there is presently very little a community can do to prevent a railroad company from taking risks that could have devastating impacts on the environment and public health, as demonstrated by the Spokane Valley-Rathdrum Prairie Aquifer case study.

Courts and the STB have refused to enforce local environmental and land use regulations where those regulations impact railway operations, even where the environmental threat is significant and federal law imposes no restrictions. Consequently, Congress must close the regulatory loophole to protect communities from unwarranted environmental threats. This can be accomplished by enacting a statute closely resembling NEPA but requiring railroad companies, rather than federal government agencies, to consider the environmental impacts of their proposed actions. Such a NEPA-like statute, if carefully crafted, would close the loophole directly, while minimizing the burdens imposed on railroad companies.

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170. See Karkkainen, *supra* note 158, at 943–44.